Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL–CIO *and* John McCourt Company

International Brotherhood of Electrical Workers, Local 103, AFL–CIO *and* John McCourt Company. Cases 1–CD–914, 1–CD–915, and 1–CD–916

December 31, 1992

DECISION, DETERMINATION OF DISPUTE, AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The charges in this Section 10(k) proceeding were filed July 1, 1992, by the Employer, alleging that Respondent Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL–CIO (Laborers) in Cases 1–CD–914 and 1–CD–915, and Respondent International Brotherhood of Electrical Workers, Local 103, AFL–CIO (Local 103) in Case 1–CD–916, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees they represent rather than to employees represented by the other Respondent. The hearing was held August 5, 1992, before Hearing Officer Gerald Wolper.[1]

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, John McCourt Company, is a Massachusetts corporation engaged as a heavy and highway contractor in the construction industry. It annually receives goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of the Act, and that the Laborers and Local 103 are labor organizations within the meaning of Section 2(5) of the Act.

[1] On September 8, 1992, a notice of voluntary settlement of the jurisdictional dispute in Case 1–CD–915 was jointly filed with the Board by the Employer, the Laborers, and Iron Workers Local 7, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO (Iron Workers). (Local 103 is not directly involved in Case 1–CD–915, but it was served with a copy of this notice.) The parties stated in their Notice that they had voluntarily resolved their dispute regarding the assignment of the work in dispute in Case 1–CD–915, and requested that the Board not make an award of the work in dispute in that case. The parties' request is unopposed. It is granted, no award is made here of the work in dispute in Case 1–CD–915, and the notice of hearing in that case is quashed.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Massachusetts Bay Transportation Authority (MBTA) was engaged in a construction project at its Cabot Yard location in South Boston. The general contractor was H. J. Stabile Company, which subcontracted with the Employer to install underground (i.e., subsurface) ducts (also known as and referred to interchangeably herein as a conduits) for electrical wiring. The ducts are epoxy-coated, reinforced, 5-inch-diameter pipes of varying lengths. They are installed in banks, which in this case are a series of nine ducts, arranged in three layered rows of three, one row on top of another, and which are held in place and separated from each other by spacers: flat, 9-holed plates through which the ducts pass.

The subsurface installation of the ducts requires the surface excavation of a trench, jackhammering of existing pavement where necessary, removal of the excavated material, preparation of the trench surface, placement of the spacers, insertion of the ducts through the spacers to create the duct bank, placement of the duct bank in the trench, placement of a reinforced steel cage around the duct bank, pouring concrete to encase the duct bank, backfilling the excavation, and repaving the surface where necessary.

The Employer assigned the operation of heavy equipment associated with these tasks to its employees represented by the Operating Engineers (not a party to or otherwise involved in this proceeding), and assigned the remainder of the work associated with these tasks to its employees represented by the Laborers.

Steven Frick, vice president of operations for the Employer, testified that about 8 a.m. on June 30, 1992,[2] he received a telephone call from Robert Fagone, MBTA project manager for the instant Cabot Yard project. According to Frick, Fagone told him that he had a call from the ''electricians'' and was told that there would be a picket line and a ''disruption'' if the work of installing the duct bank was not assigned to the ''electricians.'' Fagone called an emergency meeting for 11 o'clock that morning at his office with the parties to discuss the matter.

After Frick spoke with Fagone, Frick called the Laborers' office and spoke with Joseph Pavone, Laborers' field representative. Frick told Pavone that the MBTA was concerned that the ''electricians'' had demanded the duct installation work. Pavone told Frick that the Employer had properly assigned the work to the Laborers, and that if the Employer tried to reassign it, the Employer would ''have a strike on [its] hands.''

A meeting was held in Fagone's office later that day, June 30, attended by, inter alia, Fagone, Frick,

[2] All dates are 1992 unless otherwise stated.

Employer Attorney Richard Wayne, and Local 103 Business Agent Charles Monahan.[3] According to Frick,[4] Fagone stated that there was a problem: that the ''electricians'' had expressed concern to him as to who was installing the duct bank; that he was not going to allow any disruption in service; and that he wanted the matter resolved immediately. Wayne asked Monahan what work Local 103 was claiming. Monahan said the handling and placing of the duct work in its entirety from unloading the materials from the truck to the backfilling of the trench after emplacement of the duct banks. Wayne asked Monahan why he thought that Local 103 was entitled to perform that work, because the work was expressly covered in the Employer's collective-bargaining agreement with the Laborers. Monahan said that because the work was being performed on private property, it belonged to Local 103. Wayne stated that the Employer had assigned the work in question to the Laborers and that the Employer did not understand what the problem was. Fagone stated that there was a problem, that the MBTA had been threatened with a strike, and that he would not tolerate any disruption of transportation service. He told the attendees to resolve the problem—''Make it go away.'' He told them that he could not permit the duct installation work to continue because he feared a strike. Monahan denied threatening a strike, but requested that the duct installation work be turned over to Local 103, as ''the proper licensed person in the Commonwealth to install the electrical duct bank.'' Fagone asked if there would be a disruption in service, or if the duct installation could continue. Monahan did not provide an assurance that there would not be a disruption of work, and Fagone then told the attendees, ''[T]hat's it. No more work on the job. Stop work immediately. Until this is resolved, I will not tolerate a disruption of service.'' Fagone, however, rescinded his stop-work order later that day, and instructed the Employer to continue working until further notice.

On July 2, another meeting was held, this one at the office of John Aylward, MBTA labor relations manager. In attendance at this meeting were, inter alia, Aylward, Fagone, Frick, and Wayne, but no one from either the Laborers or Local 103. Aylward asked for a compromise. But because neither representatives of the Laborers nor of Local 103 were present at this meeting, no progress was made towards a compromise. Aylward said that he would contact Local 103 to ascertain its position, but that in the meantime, and until further notice, the Employer was to stop the installation of the ducts on the project.

The Employer's employees stopped work pursuant to these instructions on July 2 and, as of the August 5 date of the hearing, had not performed any further duct-installation work on the project.

B. *Work in Dispute*

This disputed work involves the installation of ducts at the MBTA's Cabot Yard, South Boston, Massachusetts location.

C. *Contentions of the Parties*

The Employer contends, inter alia, that reasonable cause exists to believe that the Laborers violated Section 8(b)(4)(D) of the Act when its field representative, Pavone, threatened the Employer's vice president, Frick, that the Employer would ''have a strike on [its] hands'' if it tried to reassign the work in dispute from the Employer's employees represented by the Laborers.[5] The Employer further contends that the work in dispute should be awarded to its employees represented by the Laborers on the basis of the Employer's collective-bargaining agreement with the Laborers, the Employer's preference and past practice, area and industry practice, relative skills, and economy and efficiency of operation.

Local 103 maintains that it ''never made any demand from McCourt to assign the work to Local 103-represented employees . . . but only requested that the MBTA assign the installation of conduits as it has historically done; to the electricans.'' Local 103 further contends that the work in dispute should be awarded to employees it represents, on the basis of collective-bargaining agreements it has with *other* employers. Local 103 asserts that these agreements cover employees classified as journeymen and apprentice electricians, who regularly perform work like that in dispute. Local 103 also contends that the work in dispute should be awarded to employees it represents on the basis that it is on an MBTA project, and that on such projects MBTA itself usually either assigns the work in dispute to electrical contractors who have collective-bargaining agreements with Local 103 or, less frequently, when MBTA chooses to perform work in-house rather than subcontract it, it assigns such work to its own wiremen employees who are represented by Local 103.

[3] Although the Laborers had been notified of this meeting, it did not send a representative.

[4] Frick was the only witness called by the Employer. All evidence cited here relating to the above June 30 telephone discussions and to the discussions at the June 30 and July 2 meetings described infra comes from Frick's testimony.

[5] The Employer also contends that reasonable cause exists to believe that Local 103 violated Sec. 8(b)(4)(D) when its business agent, Monahan, did not assure MBTA Project Manager Fagone that there would be no disruption in service. Because we find infra that Pavone's threat to Frick establishes reasonable cause to believe that Sec. 8(b)(4)(D) has been violated, we find it unnecessary to pass on the Employer's additional contention that Monahan's failure to assure Fagone that there would be no disruptions also constitutes reasonable cause to believe that Sec. 8(b)(4)(D) has been violated.

Local 103 also relies on the testimony of Philip Bonanno, president of J. F. White Construction Company (not involved in the instant case) in a June 1988 hearing before the Massachusetts Board of State Examiners of Electricians (discussed below).[6]

Local 103 further contends that, unlike for the Laborers, there is record evidence (the testimony of Local 103 Business Agent Donn Berry) that both apprentice and journeymen electricians are given formal training in the installation and bending of conduits.

The Laborers did not file a brief or statement of position with the Board. Although it was represented at the hearing by its business manager, Paul McNally, he made neither an opening nor closing statement, and he participated only briefly in the presentation of evidence.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k), it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for voluntary adjustment of the dispute.

The Employer's vice president Frick testified that at the June 30 meeting in the office of MBTA Project Manager Fagone, IBEW Local 103 Business Agent Monahan said that Local 103 was claiming the handling and placing of all the duct work on MBTA property. Frick also testified that Laborers' field representative, Pavone, had earlier threatened Frick that the Employer would ''have a strike on [its] hands'' if the Employer tried to reassign the work in dispute from the Employer's employees represented by the Laborers.

There is no assertion, and no evidence, that an agreed-upon method exists for the voluntary adjustment of the instant dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There is no evidence that either Local 103 or the Laborers are certified to represent any of the Employer's employees. Accordingly, the factor of certifications is not helpful to a determination of the dispute.

The Employer has never had a collective-bargaining agreement with Local 103, or with its parent, International Brotherhood of Electrical Workers, AFL–CIO (IBEW). The Employer has, however, had successive collective-bargaining agreements with the Laborers for over 30 years, and is currently a signatory to the June 1, 1991–May 31, 1994 collective-bargaining agreement between the Laborers and the Labor Relations Division of the Construction Industries of Massachusetts, Inc., of which the Employer is a member. Article VIII, sections 1 and 2, of this collective-bargaining agreement makes it applicable to ''laying conduits and ducts'' and ''construction . . . of . . . duct lines.'' Also, article XXIII and Appendix A of the contract make it applicable to the ''digging of trenches . . . prior to laying pipe or conduit for any purpose.'' Accordingly, we find that the factor of collective-bargaining agreements favors an award of the work in dispute to the Employer's employees represented by the Laborers.

2. Employer preference and past practice

Frick testified with specificity that on all employer projects as far back as 1981 involving the type of work that is in dispute here, the Employer consistently assigned such work to its employees represented by the Laborers, and never assigned such work to employees represented by Local 103 or the IBEW.

We find that this factor favors an award of the work in dispute to the Employer's employees represented by the Laborers.

3. Area and industry practice

Frick testified that the Construction Industries of Massachusetts, Inc., of which the Employer is a member, is a statewide employer association that represents employers engaged in heavy and highway construction. Frick testified that he knows that the other members of the association assign the type of work in dispute here to members of the Laborers, and that it is the practice of the approximately 24 signatories to the above-mentioned 1991–1994 collective-bargaining agreement to assign such work to their employees represented by the Laborers.

Local 103 Business Agent Donn Berry also testified that Local 103 represents the employees of ''some-

[6] J. F. White Co. is not a party to the instant proceeding, and the Employer here, McCourt, was not a party to the 1988 state proceeding. Bonanno did not testify in the instant proceeding.

thing under 200'' electrical contractors in eastern Massachusetts, all of whom are signatory to Local 103's September 1, 1991–August 31, 1993 collective-bargaining agreement with the Electrical Contractors Association of Greater Boston, Inc., Boston Chapter, National Electrical Contractors Association (Boston NECA). According to Berry, work like the work in dispute is consistently assigned, pursuant to this collective-bargaining agreement, to employees represented by Local 103. More specifically, Berry testified that when the type of work in dispute here is performed by electrical contractors on MBTA property, it has ''typically and historically'' been performed by employees represented by Local 103. Berry named eight particular electrical contractors as examples of contractors who are signatory to the Local 103-Boston NECA collective-bargaining agreement and who have assigned such work to employees represented by Local 103.[7]

Local 103 Business Agent Charles Monahan testified Local 103 represents MBTA's electricians, referred to as wiremen, and that these MBTA wiremen sometimes install conduit on MBTA premises. Monahan further testified that MBTA also employs ''laborers,'' but that to the best of his knowledge these laborers do not install conduit on the MBTA ''system.'' Finally, Monahan testified that since August 1990 there have been ''many'' projects involving the installation of conduits on MBTA premises. He named three such projects, including the overall H. J. Stabile Cabot Yard project in the instant case (but not, of course, the particular duct installation in dispute in this case). Monahan testified that on all three projects, Local 103-represented employees of electrical contractors installed conduits.

We find that the record, as summarized above, does not establish the existence of a consistent area- or industry-wide practice of assigning work like that in dispute to either the Laborers or Local 103. Accordingly, we find that this factor does not favor award of the work in dispute to employees represented by either the Laborers or Local 103, and thus this factor is not helpful in determining the dispute.

4. Relative skills

Frick testified that the Employer's employees represented by the Laborers are ''proficient'' in performing the work in dispute. Berry testified that all apprentice electricians who go through the formal training established by the Joint Apprenticeship and Training Committee of Local 103 and the Boston NECA are given training in the installation and bending of conduit, and that journeymen electricians are offered ''training courses for updates with respect to the installation of conduits.''

The evidence shows that both groups of employees have the requisite skills to perform the work in dispute. Accordingly, we find that this factor is not helpful in determining the dispute.

5. Economy and efficiency of operations

Frick testified that the Employer believes that the most efficient and economical way to install duct work is the way the Employer does it, with employees represented by the Operating Engineers operating the heavy equipment associated with the installation of duct banks, and with employees represented by the Laborers performing the remainder of the tasks associated with the work in dispute. Frick testified that it would be inefficient to use electricians in performing the work in dispute because, according to his understanding, ''they only have one task to do,'' and could not be utilized by the Employer for the remainder of a normal workday.

Local 103 asserts that the testimony of Philip Bonanno, president of contractor J. F. White Company, in the above-mentioned 1988 hearing before the Board of State Examiners of Electricians, aptly describes the typical manner in which poured-in-place conduits such as those in the instant case are installed. Bonanno testified there that (1) operating engineers excavate the trench with an excavation machine, (2) laborers do any shoveling required, actually creating the trench itself, (3) carpenters set up the form to receive the concrete, (4) ironworkers put in the steel reinforcing bars, (5) electricians install the fiberglass or PVC ducts, (6) laborers pour the concrete, and (7) sometimes (but only ''rarely'') cement finishers ''get involved in finishing.'' Bonanno testified that when the installation of ducts is performed in this manner, the only participation by the electricians is in setting the ducts themselves, around which the concrete would be poured.

Local 103 Business Agent Monahan testified that there was an electrical contractor, Seaver Company, working on the project in question, that Seaver's electricians were on the project site ''at all times,'' and that when the operating engineers and laborers had completed preparation of the trench for the actual installation of the ducts, it ''would be possible for electricians to then come over and install the conduits . . . without breaking the continuity of the job.'' Based on this testimony, Local 103 argues in its brief that

> An electrician could perform other duties during the day, and there would be no added costs in alerting the electricians on the site when the conduit was to be installed. Therefore, the job would be as economic and efficient having trained electricians install the conduit at the Cabot Yard site.

[7] Berry testified that he knew that three of these electrical contractors did not have collective-bargaining agreements with the Laborers, but that he did not know whether three others did. He was not asked about the remaining two.

Presumably, the electricians would perform these ''other duties'' while employed by another employer on the project.

The evidence and argument summarized above indicate that employees represented by Local 103 would actually perform only one task involved in the overall work in dispute—putting the conduit in place in the trench, whereas employees represented by the Laborers would perform all such tasks except the operation of heavy equipment. Accordingly, we find that the factor of economy and efficiency of operations favors an award of the work in dispute to the Employers' employees represented by the Laborers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement in effect between the Laborers and the Employer, the Employer's preference and past practice, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of John McCourt Company represented by the Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL–CIO, are entitled to perform the installation of ducts at the Massachusetts Bay Transportation Authority's Cabot Yard, South Boston, Massachusetts location.

ORDER

The notice of hearing in Case 1–CD–915 is quashed.